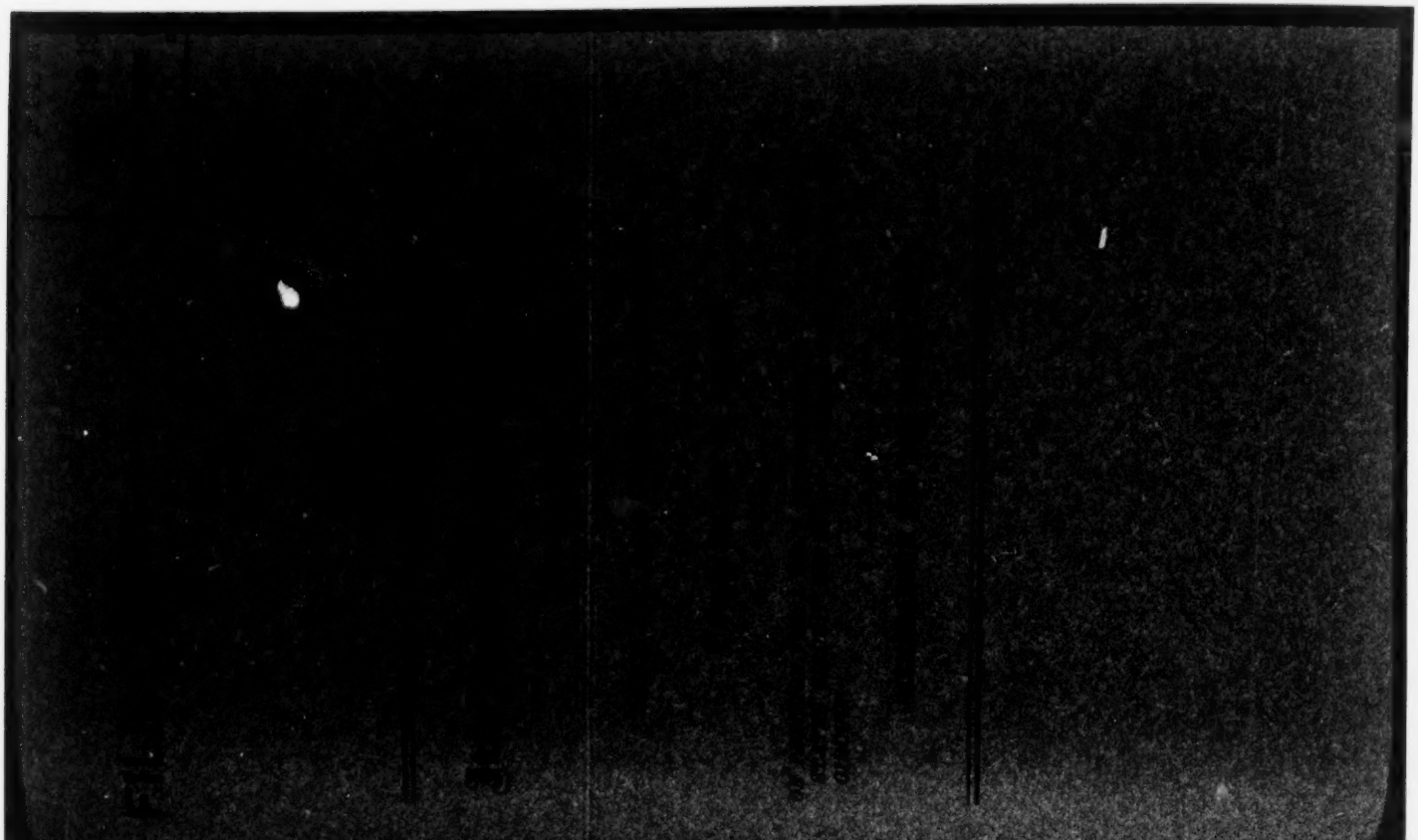

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 515

BEMIS BRO. BAG COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In this case the petitioner filed timely claims for refund of its 1918 and 1919 taxes upon the ground that the excess and war profits taxes should be specially assessed under Sections 327 and 328 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1093). After consideration of the claims the Commissioner of Internal Revenue notified the petitioner that they would be rejected. (R. 57, 58.) There is nothing in the record which shows whether the rejection of these claims was ever included in a schedule signed by the Commissioner. After the

expiration of the statutory period for filing claims for refund the petitioner protested in writing against the rejection of its claims, specifying as an additional ground for refund that certain additions to its invested capital should be made. This ground was not stated in the original claims. The Commissioner reconsidered the claims, determined an overassessment for each year upon the new ground set forth in the protest, but stated that the amounts of the overassessments could not be allowed since they were not covered by proper claims for refund and were therefore barred by the statute of limitations. (R. 69, 79.)

In this suit to recover the amount of the overassessments, determined under the circumstances stated above, the court below held that the suit was barred because of the failure to file an adequate claim for refund specifying the ground upon which the overassessments were determined within the statutory period, and that the claim based upon that ground filed after the expiration of the period was not a compliance with the statutory condition. We believe that the judgment of the court below was correct.

The petitioner relies upon a conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in *McKesson & Robbins* v. *Edwards*, 57 F. (2d) 147; and *Prentiss & Co.* v. *United States*, 57 F. (2d) 676; and with the decisions of the Court of Claims in *Factors & Finance Corp.* v. *United States*, 56 F. (2d) 902; and *Memphis Cotton Oil*

Co. v. *United States*, 59 F. (2d) 276. In the last three cases mentioned petitions for certiorari, filed by the Government, have been granted, and the cases are now pending after argument.[1]

We believe that this case is distinguishable from *United States* v. *Factors & Finance Corp.* and *United States* v. *Memphis Cotton Oil Co.* There is also some basis for distinction between the *Prentiss & Co. case* and this case. In the *Prentiss case* a letter stating that the taxpayer's claim for refund would be rejected was sent to the taxpayer. An amended claim for refund was filed, and after such filing, rejection of the claim was included in a rejection schedule. Although the opinion of the Circuit Court of Appeals indicates that that court may have considered the letter as a rejection, it seems clear that the final action of the Commissioner in rejecting the claim occurred when it was included in the rejection schedule. Accordingly, it is possible to regard the amended claim as filed before final rejection. In the instant case the record does not show that rejection of the petitioner's original claims for refund was noted in the rejection schedules after the letters were sent notifying the petitioner that its claims would be rejected. (R. 57–58.) The Court of Claims has held in several cases that, where the last act of the Commissioner in connection with the rejection of claims for refund

[1] *United States* v. *Prentiss & Co.*, No. 234, October Term, 1932; *United States* v. *Factors & Finance Corp.*, No. 141, October Term, 1932; *United States* v. *Memphis Cotton Oil Co.*, No. 308, October Term, 1932.

is the sending of a letter notifying the taxpayer that the claim for refund is to be rejected, such letter constitutes rejection. *Savannah Bank & Trust Co.* v. *United States,* 58 F. (2d) 1068 (C. Cls.); *New England Mutual Life Insurance Company* v. *United States,* 72 C. Cls. 658, 52 F. (2d) 1006; *The Daily Pantagraph, Inc.,* v. *United States,* 68 C. Cls. 251, 37 F. (2d) 783, certiorari granted on another question, 281 U. S. 716, and reversed, 282 U. S. 813. If the letters notifying the petitioner that its claims for refund would be rejected constitute rejection, then the case seems to present only the question whether claims for refund may be amended after rejection and after the statute of limitations upon the filing of claims for refund had expired. There are a number of decisions holding that a claim for refund may not be amended after rejection by the Commissioner. See *Jonesboro Grocer Co.* v. *United States,* 66 C. Cls. 320, certiorari denied, 280 U. S. 562; *Mutual Life Insurance Co.* v. *United States,* 72 C. Cls. 204, certiorari denied, 284 U. S. 628; *Solomon* v. *United States,* 57 F. (2d) 150 (C. C. A. 2d); *Wausau Sulphate Fibre Co.* v. *United States,* 72 C. Cls. 189.

Although the instant case may be distinguished from the *Prentiss & Co. case* upon the ground stated, we are not inclined to oppose the granting of a writ in this case, since the *Prentiss case* is now pending in this Court on the merits. However,

we respectfully suggest that consideration of the present petition be deferred until decision in the *Prentiss & Co. case,* since the decision in that case may make it unnecessary for the Court to grant review herein.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

DECEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1933

FILE COPY

JAN 10

No. 815

In the Supreme Court of the United States

OCTOBER TERM, 1942

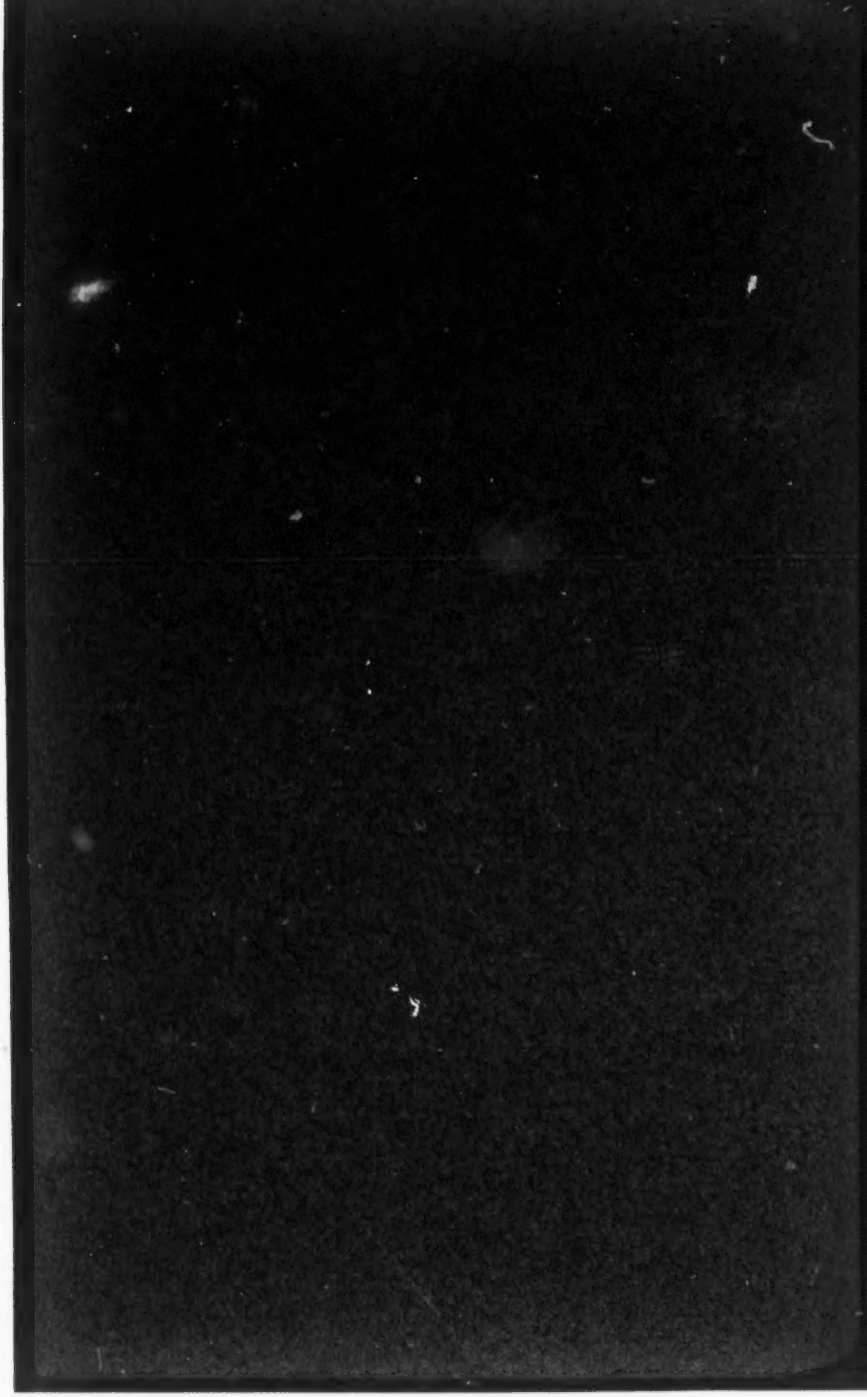
BERRY BRO. BAG COMPANY, A CORPORATION,
PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION



In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 515

BEMIS BRO. BAG COMPANY, A CORPORATION,
petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petition for certiorari in this case was not opposed by the respondent because there was then pending after argument in this Court the case of *Henry Prentiss & Co., Inc.* v. *United States,* 57 F. (2d) 676, (C. C. A. 2d), No. 234, October Term, 1932, which was said by petitioner to be in conflict with the instant case. In the memorandum filed on behalf of the respondent it was suggested that consideration of the petition be deferred until decision in the *Prentiss case,* since the decision in that case might

render it unnecessary for the Court to grant review herein. On January 9, 1933, the Court announced its decision in the *Prentiss case,* which we believe controls and disposes of the instant case and renders a review herein unnecessary.

In the *Prentiss case* the taxpayer filed a timely claim for refund of an alleged overpayment of 1918 taxes, specifying as the ground for refund that owing to abnormal conditions affecting its capital and income there could be no fair computation of the tax by valuation of its capital in accordance with the statutory definition and that its tax should be determined specially as provided for under Sections 327 (d) and 328 of the Revenue Act of 1918, c. 18, 40 Stat. 1057. In due course on July 16, 1925, the Commissioner notified the taxpayer that there was no evidence of abnormal conditions sufficient to warrant a special assessment of its taxes and that accordingly the claim for refund would be rejected. The proceeding was kept open, however, and thereafter the taxpayer was granted a hearing on its claim and filed an amended proof of claim, setting forth evidence of undervaluation of certain assets and assigning that fact as further ground for refund. The amended proof of claim was filed before final rejection of the original claims, but after the expiration of the statutory period within which an original claim for refund could be filed. The Commissioner finally rejected the claims by signing the rejection schedule on September 3, 1926. It was

held that the claim specifying as the sole ground for refund the necessity of a special assessment of the tax under Sections 327 (d) and 328 of the Revenue Act of 1918 could not be converted by amendment into a claim for refund on the ground of an erroneous valuation of capital under the statute (Section 326). Consequently, it was held that the amended proof of claim was ineffective as an amendment of the original claim, and since it was filed after the expiration of the statutory period for filing an original claim, it was not a sufficient compliance with statutory requirements to support a suit for refund on the ground therein specified.

The instant case is not distinguishable from the *Prentiss case* in any material respect. Here the petitioner filed on February 29 and December 12, 1924, respectively (R. 11, 12), timely claims for refund of 1918 and 1919 taxes, specifying as the ground therefor that its taxes should be specially assessed under Sections 327 (a) and (d) and 328 of the Revenue Act of 1918, because the Commissioner could not determine its capital in accordance with the statute and there were abnormal conditions affecting capital and income which would work a hardship if the tax were computed by valuation of capital according to the statute (R. 29–33, 53–55). In due course the Commissioner, after consideration of the claims, notified the petitioner on October 20 and November 27, 1926, that its claims would be rejected. (R. 57, 58.) The record does not disclose when, if at all, the claims were

included in a rejection schedule signed by the Commissioner. On December 13, 1926, after the expiration of the statutory period for the filing of claims for refund, the petitioner protested the rejection of its claims and asserted, as an additional ground for the refund, that its capital should be revised by restoring thereto certain items alleged to have been improperly eliminated. (R. 58–62.) The latter ground for refund was not asserted in the original claims. Upon reconsideration of the claims the Commissioner found overassessments of taxes for 1918 and 1919, upon the additional ground asserted in the protest, but notified the petitioner that the amounts thereof could not be refunded because not covered by proper claims and they were therefore barred by the statute of limitations. (R. 69–79.) The court below held that the suit for refund on the additional ground first asserted in the protest could not be maintained, because the original claims, having failed to assert the ground relied on, were not a sufficient compliance with statutory requirements and the claim asserting the ground relied on was filed after the expiration of the statutory period for filing refund claims. The court below further held that the protest was ineffectual as an amendment of the original claims such as would support the suit upon the additional ground.

The petitioner urges that the *Prentiss case* is distinguishable for the reason that here the claim for special assessment was based upon the inability

of the Commissioner to determine its capital, as well as upon the existence of abnormal conditions affecting capital and income, and that all the facts entitling the petitioner to a refund on the ground of undervaluation of capital, as asserted in the protest, were set forth in the original claims. We submit, however, that this circumstance affords no substantial distinction and is insufficient to take the instant case out of the rule of the *Prentiss case*. The principle there established is that a claim for refund on the ground that the tax should be determined specially because of abnormal conditions affecting capital and income may not be converted, by way of amendment after the expiration of the period of limitations for filing claims, into a claim for refund on the ground of undervaluation of capital as defined by statute and that a suit for refund on the latter ground can not be maintained.

The instant case falls within that principle. The original claims filed by the petitioner demanded refund on the ground that its taxes should be specially assessed not only because the Commissioner could not determine its capital in accordance with the statute but also because no fair computation of the tax could be made by valuation of capital according to the statute due to abnormal conditions affecting capital and income. While the original claims did set forth certain facts relating to erroneous eliminations from capital, they were given in connection with the allegation that capital could not be determined. The facts relating to capital eliminations

were not offered to support a refund on the ground of undervaluation of capital but were set forth solely to support the contention that special assessment should be allowed. Not until the protest was filed, after the statute of limitations had expired, did the petitioner claim refund of its taxes on the ground that capital should be revalued for the purpose of the statutory rate of the excess profits tax. The considerations upon which the decision in the *Prentiss case* was rested are present in the instant case. The petitioner places some reliance upon the fact that the record fails to show that it ever assented to the Commissioner's valuation of capital, which did appear in the *Prentiss case,* but as said by the Court in *United States* v. *Factors & Finance Co.* (No. 141, October Term, 1932), decided January 9, 1933, with the *Prentiss case,* "the Prentiss ruling would have been the same if agreement had been absent."

The fact that here special assessment was claimed as the ground for refund for the reason that capital could not be determined, as well as that abnormal conditions affected capital and income (which latter reason alone was assigned in the original claims involved in the *Prentiss case*) is not a distinguishing circumstance. While the two reasons require somewhat different administrative inquiry, both relate to the same end: administrative relief from the normal computation of the tax through the exercise of discretion in granting special assessment in lieu thereof.

We do not believe that the analysis in the opinion of the Court in the *Factors & Finance case* of the differences between the two bases for special assessment indicates that there is a distinction in principle between this case and the *Prentiss case.* In the *Factors & Finance case* the original claim for refund was general, specifying no particular grounds, and the amendment asserting the specific ground that the tax should be specially assessed was held sufficient, although filed after the statute of limitations expired but before rejection of the original claim.

The instant case is to be distinguished from *United States* v. *Memphis Cotton Oil Co.* (No. 308, October Term, 1932), also decided January 9, 1933, where it was held that a general claim for refund is subject to amendment at any time before final rejection although the statute of limitations may have expired. In the instant case the original claims for refund were based upon the specific ground that the tax should be specially assessed and the attempted amendment, filed after the statute of limitations had expired, asserted another and different specific ground. That fact distinguishes the *Factors & Finance* and *Memphis Oil Co. cases* from the instant case and also the *Prentiss case,* which we interpret as holding that a claim for refund based solely on an appeal to administrative discretion for special assessment is not subject to amendment, by asserting a basis for refund not involving

special assessment after the statute of limitations expires.

The possible distinction between the *Prentiss case* and this case, referred to in the original memorandum on behalf of the respondent (pp. 3–4), does not require review of this case in view of the basis upon which this Court's decision in the *Prentiss case* proceeded. The memorandum suggested that in the instant case there may have been a rejection before amendment, while rejection in the *Prentiss case* did not occur until after amendment. It is clear that if the letters notifying the petitioner that its claims would be rejected are a rejection of the claims, the attempted amendment in this case would be ineffective, for in that event the amendment was too late. See *United States* v. *Memphis Cotton Oil Co., supra.* The court below indicated that the claims were rejected by such letters and in the original memorandum for the respondent filed herein, authorities in support of that view are cited (p. 4).

The instant case is within the principle established by the *Prentiss case* and the rule there announced seems to control decision here. The decision of the court below is in accord with the decision of this Court in the *Prentiss case.* As the principles governing such cases have been so recently stated by this Court, further consideration of such questions by this Court seems to be unnecessary unless and until difficulties develop in the

application of those principles by administrative officers and the lower tribunals.

The petition for certiorari should be denied.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

JANUARY, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933